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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Velena Tsosie,

Plaintiff,

v.

NTUA Wireless, LLC, a Delaware Limited
Liability Company; Walter Haase and Jane
Doe Haase, husband and wife,

Defendants.

2:23-cv-0105-DGC

**REPLY IN SUPPORT OF MOTION
TO DISMISS FOR LACK OF
JURISDICTION**

1 Defendants state the following in reply to Plaintiff's Response to Defendants' Motion
2 to Dismiss for Lack of Jurisdiction:

3 **I. Introduction**

4 Plaintiff's arguments in response to Defendants' Motion to Dismiss fall somewhere
5 between circular and paradoxical and offer no reason that Defendants' Motion should not be
6 granted. Plaintiff first argues that sovereign immunity is waived, and then argues that
7 sovereign immunity does not exist. Both statements cannot be true, and indeed, neither of
8 them are. NTUA waived its sovereign immunity for the sole purpose of enforcement of the
9 Operating Agreement between it and Commnet Newco and none of Plaintiff's claims arise

1 under that agreement or are even remotely connected to it. And concerning the five factors
2 laid out in *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014), the documents
3 submitted by Plaintiff in response only bolster Defendants’ arguments by adding detail
4 concerning NTUA’s ownership, management, and financial relationship with NTUA
5 Wireless. NTUA Wireless is an arm of the Navajo Nation.

6 **II. Argument**

7 **A. Sovereign immunity was not waived.**

8 Plaintiff’s argument that sovereign immunity is waived is based on the untenable
9 premise that her claims arise out of the operating agreement between NTUA and Commnet
10 Newco. Plaintiff reasons that because NTUA’s waiver of immunity for the purposes of
11 enforcing the Operating Agreement applies to “any proceeding that is connected with any of
12 the transactions that are contemplated by the Operating Agreement,” and because she felt
13 that her attendance at a dinner the evening before a business meeting scheduled for the next
14 morning was part of her responsibilities, that NTUA unequivocally waived its sovereign
15 immunity for her claims based on the events at that dinner.

16 This is untenable for several reasons. First, the “broad” waiver of immunity is
17 obviously and explicitly within the context of enforcement of the Operating Agreement.
18 NTUA waived its immunity for any proceeding connected with any of the transactions that
19 are contemplated by the Operating Agreement but it did so only for the purposes of claims
20 for enforcing the agreement. Doc. 11-1 at § 12.3(d). NTUA did not waive its immunity for
21 claims by every conceivable party to every transaction contemplated by the Operating
22 Agreement. Nothing in the waiver of immunity purports to waive claims of third parties.

1 Even if this Court were inclined to adopt that interpretation, Plaintiff's argument would still
2 fail because that would be at best an implied waiver, not the unequivocal waiver of immunity
3 that would be required. *Santa Clara Pueblo v. Martinez*, 436 U.S. 165, 173 (1977). So while the
4 waiver may be broad, its context is narrow. Plaintiff conflates the narrow context of a waiver
5 for the benefit of one party with being part of some global waiver in favor of anyone who
6 might ever do business with NTUA Wireless. This is simply a creative misunderstanding on
7 Plaintiff's part. That is not how tribal sovereign immunity works.

8 Second, even if this Court adopts Plaintiff's expansive understanding of "arising out
9 of," the events alleged in Plaintiff's Complaint did not occur in the context of any
10 "transaction" arising out of or contemplated by the Operating Agreement. Plaintiff argues
11 that her claims arise out of the LLC Operating Agreement because she felt that a dinner the
12 day before a business meeting was part of her responsibilities. Doc. 11-3 ¶ 7. Even assuming
13 for the sake of argument that Plaintiff was on the job at dinner, the Operating Agreement
14 says nothing about dinners. Plaintiff does not allege that anything happened at the dinner
15 which converted it into an official business meeting or business development meeting. For
16 that matter, the Operating Agreement says nothing about business development meetings
17 either. In any case, whether the dinner was mandatory or Plaintiff just "felt" she should be
18 there, it was not something contemplated by the Operating Agreement.

19 Plaintiff's references to §§ 6.4 and 9.1 of the Operating Agreement, Doc. 11 at 5:8-16
20 are inapposite. The fact that NTUA Wireless's board can delegate certain authority and
21 duties to certain individuals does not mean that such individuals benefit from the waiver of
22 immunity by one LLC *member* for the explicit purpose of claims by another LLC *member*.

1 None of the individual offices mentioned in § 6.4 have any rights in connection with the
2 Operating Agreement, as evidenced by the last sentence of that section: “Any delegation
3 pursuant to this Section 6.4 may be revoked at any time by the Board, in its sole and absolute
4 discretion.” Doc. 11-1 at § 6.4. Nothing in § 6.4 explicitly refers to § 9.1, and nothing in § 9.1
5 makes any reference to Plaintiff or her position. None of Plaintiff’s claims have any
6 “meaningful linkage” to the rights of the two members of NTUA Wireless, LLC.

7 Third, it should go without saying that none of Plaintiff’s claims arise directly out of
8 any agreement between NTUA and Commnet Newco. Her claims are all civil rights or tort
9 claims arising under federal or state law. Her claims are for employment discrimination
10 under a federal statute, employment discrimination under an Arizona statute, and assault and
11 battery under Arizona common law. None of Plaintiff’s claims sound in contract, let alone
12 the particular contract that governs the rights and duties of LLC members of which Plaintiff
13 is not one. Plaintiff’s claims do not arise out of the NTUA Wireless Operating Agreement in
14 any way.

15 In sum, NTUA did not waive its sovereign immunity in any way relevant to Plaintiff’s
16 Claims. And the fact that Plaintiff believes such a waiver is necessary only supports
17 Defendants’ arguments below, because sovereign immunity applies to an arm of the Navajo
18 Nation.

19 **B. NTUA Wireless is an arm of the Navajo Nation.**

20 The second half of Plaintiff’s Response argues that “no sovereign immunity exists for
21 Defendants.” This is untrue under *White*, as will be further demonstrated below. And if no
22 sovereign immunity exists for Defendants, why does Plaintiff spend nearly a page and a half

1 of her Complaint pleading NTUA's sovereign immunity waiver?

2 Plaintiff is correct that NTUA Wireless, LLC is not on the list of definitions of the
3 Navajo Nation contained in the Navajo Nation Code. Obviously, if NTUA Wireless was on
4 that list, the five-factor analysis under *White* would be unnecessary because NTUA Wireless
5 would simply be an enterprise of the Navajo Nation and Defendants' motion to dismiss
6 would have been much shorter. So when Plaintiff says that "Defendants do not analyze
7 whether the Navajo Nation itself considers NTUA Wireless to be an enterprise," Doc. 11 at
8 10:8-9, she is correct but misses the point entirely. Defendants did not analyze that issue
9 because they do not assert that NTUA Wireless is an *enterprise* of the Navajo Nation under
10 Navajo law. It is an *arm* of the Navajo Nation under federal law, majority-owned and
11 controlled by an enterprise of the Navajo Nation for the benefit of the Navajo people.

12 Proceeding from this mistake, Plaintiff spends two pages conflating Navajo law
13 concerning which entities or enterprises are considered to have sovereign immunity, with
14 federal law on what makes an entity the arm of a tribe. While the concepts may overlap to a
15 degree, Navajo common law on sovereign immunity is not dispositive of what federal law
16 considers to be the arm of a tribe. A Navajo Court may well decide that NTUA Wireless
17 does not have sovereign immunity under Navajo law, but that is for a Navajo Court to
18 decide. And that has not happened, and would only be part of the picture here even if it had.

19 Plaintiff merely glosses over that fact that a tribe's intent concerning sovereign
20 immunity is only the fourth of five *White* factors and not the whole issue. And Plaintiff
21 offers no response for the reality that she is attempting to impute NTUA's waiver of
22 sovereign immunity in its agreement with Commnet Newco onto NTUA Wireless itself,

1 which only reinforces Defendants’ argument: NTUA Wireless is an arm of the Navajo
2 Nation. Again, why would NTUA’s waiver of immunity have any bearing on whether
3 NTUA Wireless waived immunity unless NTUA Wireless had sovereign immunity in the
4 first place? The allegations of Plaintiff’s Complaint, and Plaintiff’s continued insistence that a
5 waiver is necessary, require resolution of the fourth *White* factor in favor of Defendants.

6 With regard to the second *White* factor, Plaintiff’s arguments fail to contradict the
7 Defendants’ initial analysis. The fact that NTUA Wireless provides services “in and near”
8 the Navajo Nation does not counter Plaintiff’s own allegation that NTUA Wireless was
9 formed “to engage in various wireless communications business *on* the Navajo Nation.”
10 Doc. 1 ¶ 7 (emphasis added). NTUA Wireless can obviously provide services off the
11 reservation “for the benefit of the residents of the Navajo Nation” without contravening the
12 statutory purpose which specifically contemplates that circumstance. Strangely, Plaintiff cites
13 only part of 21 N.N.C. § 5(A)(1), Doc. 11 at 11:17–18, and seems to ignore the rest of it:
14 NTUA’s purpose is to provide services “for the benefit of residents of the Navajo Nation,
15 including the establishment, ownership, operation and maintenance of electric generating,
16 telecommunications and information services *on or off* the Navajo Reservation,” 21 N.N.C. §
17 5(A)(1) (emphasis added). Presumably Plaintiff is not suggesting that residents of the Navajo
18 Nation cease being so once they leave its territorial boundaries. So once again, the Court can
19 see NTUA Wireless fulfilling NTUA’s statutory purpose because it is an arm of the Navajo
20 Nation.

21 Plaintiff also mentions that the board of NTUA Wireless has the power to alter the
22 business of the company at any time. But Plaintiff offers no indication that NTUA Wireless

1 has ever done so, making this a moot point.

2 Regarding the third *White* factor, Plaintiff argues contrary to her own Complaint that
3 NTUA Wireless is “not controlled by NTUA, by the Navajo Council or by any Navajo entity
4 in any way.” Doc. 11 at 12:17–19. This is manifestly false. Plaintiff forgets that she has
5 alleged that NTUA Wireless is “owned and controlled by two members: Commnet Newco
6 ... and Navajo Tribal Utility Authority.” Doc. 1 ¶ 6. So Plaintiff admits from the very
7 beginning that NTUA has at least some control. Then, Plaintiff misrepresents to the court
8 that NTUA Wireless is half-owned by NTUA. Doc. 11 at 12:17-19. In fact, NTUA Wireless
9 is *majority* owned by NTUA: 51% to 49% for Commnet Newco. Doc. 11-1 at 44 (Schedule
10 A).

11 Furthermore, the Operating Agreement provides for four board members. Doc. 11-1
12 at § 6.1. Two are designated by Commnet Newco and two by NTUA. *Id.* However, the
13 Operating Agreement gives special power to NTUA in this regard, requiring the vote of at
14 least one NTUA-designated director to take certain actions, including matters concerning
15 subsidiaries, granting liens against the assets of NTUA Wireless, issuing any new securities to
16 Commnet Newco, modifying any agreement that impacts the financial condition of NTUA
17 Wireless, modifying any of the core “Related Agreements” that concern the core operation
18 of NTUA Wireless, and dissolving NTUA Wireless. Doc. 11-1 at § 6.3. *See also Id.* at § 1.1
19 (definition of “Related Agreement”). This arrangement gives Commnet Newco the power
20 necessary to engage in the day-to-day management of NTUA Wireless, but leaves ultimate
21 control in the hands of NTUA.

22 So, to briefly restate the matter, the third *White* factor concerns the structure,

1 ownership, and management of NTUA Wireless. According to Plaintiff's Complaint the
2 structure has Plaintiff as the chief executive of NTUA Wireless, answerable to the chief
3 executive of NTUA, Mr. Haase, and the NTUA Wireless board on which Mr. Haase sits. In
4 other words, subordinate to NTUA. The management of NTUA Wireless is nuanced but
5 leaves ultimate control in the hands of NTUA. And with regard to ownership, a majority of
6 NTUA Wireless is owned by NTUA. Doc. 11-1 at 44 (Schedule A). Thus, Plaintiff's
7 response only affirms that the third *White* factor should be weighed in Defendants' favor.

8 The fourth *White* factor, sovereign immunity, has largely been discussed above. But
9 again, Plaintiff's Complaint assumes that sovereign immunity applies by predicating this
10 Court's jurisdiction on NTUA's waiver of immunity in the first place. The Navajo Nation
11 was explicitly advised that NTUA was waiving its immunity for the purpose of enforcement
12 of the Operating Agreement with Commnet Newco. Doc. 11-1 at § 12.3(d). The qualifying
13 language "for the enforcement of this Agreement" indicates that the Council and NTUA
14 knew and understood that sovereign immunity for any other purpose was *not* being waived.

15 The final *White* factor is also augmented by Plaintiff's Response, in that now the
16 Court can see precisely what NTUA's financial contribution to NTUA Wireless was, and its
17 proportion to that of Commnet Newco. Doc. 11-1 at 44 (Schedule A). NTUA owns a
18 majority of NTUA Wireless. *Id.* NTUA Wireless is an arm of the Navajo Nation.

19 **III. Conclusion**

20 Plaintiff's response offers no reason to deny Defendants' motion to dismiss. NTUA
21 Wireless is an arm of the Navajo Nation, a tribal sovereign over which this Court lacks
22 jurisdiction. Plaintiff's Complaint should therefore be dismissed.

1

Respectfully submitted this 23rd day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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